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IN THE

Supreme Court of the United States

October Term, 1956

No. 962

W. W. TUTTLE, Resident Manager, Ernst & Ernst,

Petitioner,

—against—

FEDERAL TRADE COMMISSION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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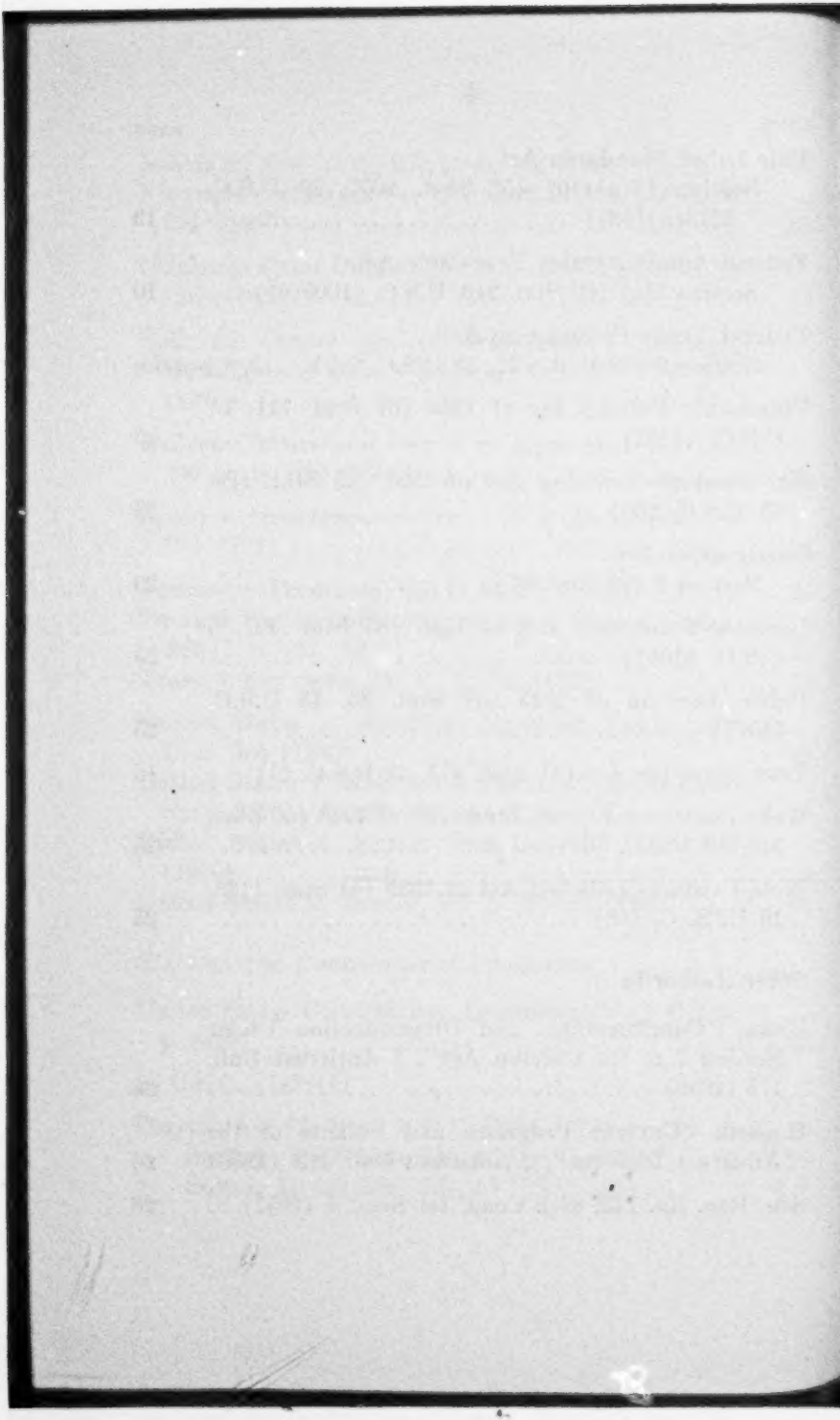

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled case pursuant to its decision dated April 2, 1957.

Opinions Below

The opinion of Hon. John M. Cashin in the United States District Court for the Southern District of New York is unreported. This decision is reproduced at pp. 48-51 of the "Appendix for Appellee" in the Circuit Court and at

pp. 1b-4b of Appendix B hereto. The opinion of the Circuit Court of Appeals, also unreported, is reproduced at pp. 5b to 35b of Appendix B hereto.

Jurisdiction

The judgment of the Court of Appeals was entered on April 2, 1957. There has been no rehearing or extension of time to petition for certiorari. Jurisdiction of this Court is invoked under 28 U. S. C. §1254(1).

Questions Presented

1. Does Section 9 of the Federal Trade Commission Act authorize the Federal Trade Commission to obtain by subpoena duces tecum documentary evidence of partnerships or corporations which are not being investigated or proceeded against by the Commission?

2. If Section 9 of the Federal Trade Commission Act does authorize the Commission to subpoena documentary evidence of partnerships or corporations not being investigated or proceeded against, is this Section unconstitutional in the context of the present case by authorizing the Commission to deprive petitioner and his firm of a valuable business without due process of law?

Statutes and Constitutional Provisions Involved

The only statutes and constitutional provisions involved in this appeal are the Fifth Amendment to the United

States Constitution (1 U. S. C. p. xliv) and Section 9 of the Federal Trade Commission Act (38 Stat. 722, 15 U. S. C. §49). The pertinent portion of the Fifth Amendment here involved is the "Due Process" clause, which provides that:

> "No person shall * * * be deprived of * * * property, without due process of law * * *."

The pertinent portion of Section 9 of the Federal Trade Commission Act here involved is the first sentence thereof, which provides:

> "* * * for the purposes of this Act the commission, or its duly authorized agent or agents, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documentary evidence of any corporation being investigated or proceeded against; and the commission shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation."

The entire texts of the Fifth Amendment and Section 9 of the Federal Trade Commission Act are reproduced in Appendix A hereto.

Statement of the Case

The sole question involved in this case is whether the Federal Trade Commission has authority to obtain evidence in a proceeding against A. G. Spalding & Bros. Inc. by issuing a subpoena duces tecum to the accounting firm of Ernst & Ernst, a partnership which is in no way being investigated or proceeded against by the Commission, when

to do so would destroy a valuable business of this firm, and when—as the Commission itself has conceded—the precise same information may be obtained from other sources.

The Nature of Petitioner's Business

Petitioner W. W. Tuttle is a resident partner of the accounting firm of Ernst & Ernst, which is a general partnership, with offices located in some 60 cities throughout the United States and Canada (23).* An important part of the business of Ernst & Ernst consists of the preparation for trade associations in some 20 industries of annual compilations of industry results known as "Census Reports" (39-41). These reports set forth on *an industry-wide basis* such items as sales and costs in units and dollars of various categories and types of items manufactured or sold during a particular year (24). Industry reports of this type have proved valuable not only to the industry involved and to the individual companies within that industry (who can compare their own performance against the total), but to banking and governmental organizations as well (26, 42). The value of the business of producing reports of this type is indicated by the fact that Ernst & Ernst's annual billings for this service are in excess of $100,000 (41).

Under the arrangement which Ernst & Ernst has with each of the trade associations for whom Census Reports are prepared, each company submits its own highly con-

* All figures in parentheses refer to page numbers of the Appendix for Appellee in the Circuit Court unless otherwise indicated. References to "Appellant's Appendix" are to the Appendix filed by the Commission in the Circuit Court. References to Appendix B to the petition are as follows: (p. —b, *infra*).

fidential figures direct to Ernst & Ernst upon the express understanding that the information as to that company will be kept in the strictest confidence by Ernst & Ernst, not only as to other individual companies submitting reports and other members of the association involved but also as to officers of the association itself and all other persons (24, 26). Indeed, it is part of the understanding that the separate information as to each company will be destroyed as soon as it has served its purpose in the preparation of a particular Census Report (24).

As was pointed out in affidavits submitted to the District Court, which affidavits were not controverted by respondent, so important competitively is the maintenance of secrecy as to a company's own figures on sales, costs etc., that it is safe to say that should for any reason the information as to individual companies be revealed by Ernst & Ernst, individual companies in all of the industries for which Census Reports are prepared would cease submitting the information as to their particular performance within the industry, and the business of compiling these reports would be destroyed (26, 27, 41). Indeed, as soon as word of the Federal Trade Commission subpoena in this case reached the athletic goods manufacturing industry, many of the individual companies either refused to submit reports for the year 1955, or if they had already submitted such reports, demanded their return, to an extent which made compilation of the 1955 report impossible (26-27).

The confidential nature of the information submitted by the individual companies is important here, not by virtue of any claim or "privilege" as to information disclosed to accountants, but rather as a demonstration of the fact

that the continued existence of the valuable business of compiling these Census Reports is dependent upon the information as to each individual company being kept secret from its competitors in the industry involved.

Proceedings Below

Among the trade associations by whom Ernst & Ernst has been retained to prepare "Census Reports" is the Athletic Goods Manufacturers Association, the members of which manufacture and sell athletic goods, clothing and equipment of various kinds (24). Census Reports for this industry have been prepared by Ernst & Ernst since 1949, on the basis of statistical information supplied directly to them by some 73 individual companies within this industry (27). Among the companies so submitting information are A. G. Spalding & Bros. Inc. and Rawlings Manufacturing Company.

On December 8, 1955 the Federal Trade Commission filed a complaint against A. G. Spalding & Bros. Inc. under Section 11 of the Clayton Act (38 Stat. 734, 15 U. S. C. §21) charging Spalding with a violation of Section 7 of the Clayton Act (38 Stat. 731, 15 U. S. C. §18) arising out of the acquisition by Spalding of all the capital stock of Rawlings Manufacturing Company (Appellant's Appendix 6a). On February 24, 1956 the Commission issued a subpoena duces tecum to the petitioner herein, a resident partner of Ernst & Ernst, directing him to testify at the instance of the Commission and to produce certain books, records and documents as follows:

> "Such books, records and documents as will disclose all correspondence, telegrams, memoranda, statistics, work papers, bulletins, census and re-

> ports prepared, transmitted or received by Ernst and Ernst, its officers, agents, employees, boards, council, committee or member thereof for the past four years, in the possession or control of Ernst and Ernst and relate to census reports prepared for the Athletic Goods Manufacturing Association." (Appellants Appendix 10a-11a)

Pursuant to this subpoena petitioner produced all of the Census Reports for the athletic goods manufacturing industry for the years 1949 through 1954 and in addition produced the individual information submitted to it by the two companies which were involved in the Section 11 proceedings, Spalding and Rawlings, for the years 1954-1955 (3, 8-9).* It was stipulated, however, that the production of the Census Reports and the individual information of Spalding and Rawlings was

> " * * * without prejudice to any and all rights to which W. W. Tuttle or Ernst & Ernst may have to object to the balance of the documentary material specified in the subpoena duces tecum * * *." (2)

Pursuant to the rights reserved by this stipulation, petitioner on the advice of counsel refused to produce the records of the individual companies which were not being investigated or proceeded against by the Commission on the grounds, among others, that neither petitioner nor Ernst & Ernst was a party to the FTC-Spalding proceeding (10), that these records were submitted by the companies in confidence upon the express understanding that they would

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* Because of its practice of destroying the records of the individual companies as soon as they had served their purpose in a Census Report for a particular year, petitioner was unable to produce the records of Spalding or Rawlings prior to 1954. (Appellant's Appendix 13a)

not be disclosed (10), that the Commission could obtain the desired information directly from the companies involved (10), that the enforced disclosure of the information contained in these records would result in the destruction of a valuable business of Ernst & Ernst without due process of law (10-11), and that the information contained in these records was purely hearsay as to the respondent in the FTC-Spalding proceeding (11).

Counsel for the Commission conceded that it could obtain the information desired from the companies themselves (11, 14, 50) but argued that it was entitled to obtain this information from petitioner (11-12) and later stated that it would cost it approximately $30,000 to go directly to the individual companies (27). After argument on the question, the hearing examiner overruled petitioner's objections and directed production of the requested material (20). Again upon advice of counsel petitioner refused to produce these records (20).

On May 17, 1956, pursuant to authority conferred upon it by Section 9 of the Federal Trade Commission Act, respondent made application to the District Court for the Southern District of New York for enforcement of the subpoena (Appellant's Appendix 1a). By answer dated June 5, 1956 (Appellant's Appendix 11a) petitioner resisted this application on substantially the same grounds alleged before the hearing examiner. In support of this answer, petitioner submitted two affidavits which set forth the facts recited at pp. 4 to 6, *supra*. No contradicting affidavits were submitted by the Commission.

In a memorandum opinion dated June 26, 1956 United States District Judge John M. Cashin denied the Commission's application for enforcement of the subpoena.

In this opinion Judge Cashin recognized that petitioner had submitted

> " * * * substantial evidence that if it produces the individual reports of the companies it will not receive them in the future and its business of compiling census reports will be destroyed." (50; pp. 3b-4b, *infra*)

However, Judge Cashin did not consider it necessary to resolve the constitutional arguments raised because he felt it clear that the plain words of Section 9 of the Federal Trade Commission Act did not authorize the issuance of the subpoena. Thus Judge Cashin concluded:

> "The Statute gives the Commission '* * * the right to copy any documentary evidence of any corporation being investigated or proceeded against; and the commission shall have power to require by subpoena * * * the production of all such documentary evidence * * *.'
>
> Petitioner concedes that respondent is neither being investigated nor proceeded against. The subpoena is unauthorized and the application is denied." (51; p. 4b, *infra*)

By notice of appeal filed on August 24, 1956 the Commission appealed to the Court of Appeals for the Second Circuit.

On April 2, 1957 that court handed down a decision which, by a two to one majority, reversed the decision of Judge Cashin and granted enforcement of the subpoena on the ground that Section 9 of the Federal Trade Commission Act authorizes the Commission to subpoena documentary evidence from partnerships or corporations regardless of

the fact that these partnerships or corporations are neither being investigated nor proceeded against by the Commission. The majority (comprised of Circuit Judge Carroll C. Hincks and District Judge Vincent L. Leibell) held that the sentence of Section 9 giving the Federal Trade Commission power to subpoena "all such documentary evidence relating to any matter under investigation" should be "construed" to read "all documentary evidence relating to any matter under investigation", in the words of these judges, "thus eliminating the word 'such' " (p. 24b, *infra*). This construction was adopted in order to comply with what the majority felt to be "the policy and purposes of the Act" (p. 24b, *infra*).

The majority also rejected arguments of the petitioner that, as construed by the majority, Section 9 was unconstitutional by depriving petitioner of a valuable business without due process of law, that the Commission has no power to issue a subpoena duces tecum in a proceeding brought solely to enforce the Clayton Act, and that under the particular facts of this case the subpoena was unreasonable and oppressive and therefore not "in accordance with law" as provided by Section 6(c) of the Federal Administrative Procedure Act (pp. 12b-15b, *infra*).

Circuit Judge Harold R. Medina dissented from the construction of Section 9 eliminating the word "such" adopted by the majority, but also voted for reversal, stating that in his opinion the Commission was entitled to obtain documentary evidence of the various individual corporations which had been submitted to Ernst & Ernst on the ground that these companies were "being investigated" within the meaning of Section 9 (p. 35b, *infra*).

REASONS FOR GRANTING THE WRIT

I. The Court of Appeals Erred in Disregarding the Plain Meaning of Section 9

The first sentence of Section 9 of the Federal Trade Commission Act provides that:

> "* * * for the purposes of this Act the commission, or its duly authorized agent or agents, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any *documentary evidence of any corporation being investigated or proceeded against;* and the commission shall have power to require by subpoena the attendance and testimony of witnesses and the production of all *such documentary evidence* relating to any matter under investigation."*

In his opinion denying the Commission's application for enforcement of the subpoena, Judge Cashin in the District Court held that the phrase "such documentary evidence" means "documentary evidence of any corporation being investigated or proceeded against" (51; p. 4b, *infra*). And this, we submit, is the only possible construction of this statute. It is impossible to ascribe any meaning to the word "such" other than that found by Judge Cashin.

Apparently recognizing this very fact in their opinion below, the majority of the Court of Appeals for the Second Circuit did not even attempt to ascribe any meaning to the word "such" other than that attributed to it by Judge Cashin. Instead—under the guise of "construction"—they

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* Throughout this petition emphasis is supplied unless otherwise indicated.

proceeded to completely eliminate the word "such" from the statute. In so doing, we submit, these judges completely disregarded one of this Court's basic principles of statutory construction.

As stated by Judge Medina in his dissenting opinion in the court below, this Court has consistently held that where the words of a statute are plain on their face, they must be given the meaning which ordinary men would attribute to them; the various rules intended to resolve ambiguities cannot be invoked where such ambiguities do not exist. As stated in *Adams Express Company* v. *Commonwealth of Kentucky,* 238 U. S. 190, 199 (1915):

> "It is elementary that the first resort, with a view to ascertaining the meaning of a statute, is to the language used. If that is plain there is an end to construction and the statute is to be taken to mean what it says."

In *Caminetti* v. *United States,* 242 U. S. 470 (1917), a prosecution under the Mann Act, this Court rejected the claim of the defendant that the language of that Act making it a criminal offense to knowingly transport in interstate commerce any woman or girl for the purpose of prostitution or debauchery or for "any other immoral purpose" was intended to reach only cases of "commercialized vice". In so holding the Court stated:

> "Where the language is plain and admits of no more than one meaning the duty of interpretation does not arise and the rules which are to aid doubtful meanings need no discussion. *Hamilton V. Rathbone,* 175 U.S. 414, 421. There is no ambiguity in the terms of this act." 242 U. S. at 485

Similarly, in *Addison* v. *Holly Hill Fruit Products, Inc.*, 322 U. S. 607, 617 (1944), Mr. Justice Frankfurter stated with regard to the meaning of the words "area of production" in Section 13(a)(10) of the Fair Labor Standards Act:

> "* * * after all Congress expresses its meaning by words. If legislative policy is couched in vague language, easily susceptible of one meaning as well as another in the common speech of men, we should not stifle a policy by a pedantic or grudging process of construction. To let general words draw nourishment from their purpose is one thing. To draw on some unexpressed spirit outside the bounds of the normal meaning of words is quite another."

This language is directly applicable here. As pointed out above, in the words of Judge Medina, it is "clear beyond cavil" that in Section 9 of the Federal Trade Commission Act the phrase "such documentary evidence" is susceptible of no interpretation other than "documentary evidence of any corporation being investigated or proceeded against" (p. 28b, *infra*). By construing this phrase to read "documentary evidence relating to any matter under investigation", the majority in the court below clearly violated this fundamental principle.

II. Under Prior Decisions of This Court, None of the Reasons Given by the Circuit Court as Justification for the Elimination of the Word "such" from Section 9 Is Sufficient To Justify Such Action

While recognizing that petitioner's contention that the phrase "such documentary evidence" relates to "documentary evidence of any corporation being investigated

or proceeded against" "might appear to be reasonable" (p. 16b, *infra*), the majority in the court below attempted to justify its elimination of the word "such" from the statute on the following grounds: (1) that the construction adopted by petitioner, as well as Judges Cashin and Medina, conflicted with other provisions of Section 9; (2) that it conflicted with the "legislative history", the "Congressional intent" and the "purpose and policy" of the Federal Trade Commission Act; (3) that it would unduly hamper and restrain the Commission's functioning under the Act to an extent that would be "absurd", "futile" or "unreasonable"; and (4) that an alleged long-standing practice of the Commission to issue subpoenas to third parties not under investigation justified the construction of the majority.

Examination of each of these reasons, however, will disclose that, under principles of statutory construction firmly established by prior decisions of this Court, none of these reasons constitutes a sufficient justification for such a flagrant disregard for the plain meaning of the statute as was evidenced by the majority in the court below.

A. Conflict with Other Provisions of Section 9

The only substantial conflicts between the subpoena power as construed by Judges Cashin and Medina and other provisions of Section 9 relied on by the majority were an alleged "incongruity" between the subpoena power and the deposition power, an alleged conflict with the immunity provision of the last paragraph of Section 9 and an alleged rendering useless of the access power also conferred by Section 9.

With regard to the deposition power it is enough to point out, as did Judge Medina, that this power is conferred in language which authorizes the Commission to compel "any person * * * to appear and depose and to produce documentary evidence *in the same manner as witnesses may be compelled to appear and testify and produce documentary evidence before the commission as hereinbefore provided*". Obviously, since the deposition power is expressly related to the limits of the subpoena power, there can be no "incongruity" between the two.

The argument based on the immunity provision of the last paragraph of Section 9 supports only the proposition that documentary evidence may be subpoenaed from partnerships and individuals as well as from corporations, a proposition which petitioner has never disputed. It does not in any way support the proposition that documentary evidence may be subpoenaed from third parties not under investigation or being proceeded against.

Finally, with regard to the rendering useless of the subpoena power supposedly arising from the construction adopted by Judges Cashin and Medina, suffice it to say that, as pointed out by Judge Medina, the construction adopted by Judges Leibell and Hincks has the equally absurd effect of rendering useless the access power. Indeed, as stated by Judge Medina:

> "* * * in the earlier versions of the Act the access power and the subpoena power were found in different sections in different parts of the Act. It is not unlikely that when the Conference Committee incorporated both powers into a single section they noticed for the first time that the power to subpoena documents was broader than the access power and,

since there was no apparent reason why that should be so, they deliberately correlated the two." (pp. 32b-33b, *infra*)

B. Legislative History and Intent of Congress

It is a firm principle of this Court that legislative history will not be looked to in order to ascertain Congressional intent when the language of the statute in question is plain upon its face and admits of no ambiguities. As succinctly stated by Mr. Justice Butler in *United States* v. *Missouri & Pacific Railroad Company*, 278 U. S. 269, 278 (1929):

> "Where doubts exist and construction is permissible, reports of the committees of Congress and statements by those in charge of the measure and other like extraneous matter may be taken into consideration to aid in the ascertainment of the true legislative intent. But where the language of an enactment is clear and construction according to its terms does not lead to absurd or impracticable consequences, the words employed are to be taken as the final expression of the meaning intended. And in such cases legislative history may not be used to support a construction that adds to or takes from the significance of the words employed."

Similarly, in *Railroad Commission of Wisconsin* v. *Chicago, Burlington & Quincy Railroad Company*, 257 U. S. 563, 588-89 (1922), a case arising under the Transportation Act, this Court rejected all reference to legislative history with the following language:

> "Great stress is put on the legislative history of the Transportation Act to show that the bill was not intended to confer on the Commission power to remove any discrimination against interstate com-

> merce involved in a general disparity between interstate and intrastate rates. Committee reports and explanatory statements of members in charge made in presenting a bill for passage have been held to be a legitimate aid to the interpretation of a statute where its language is doubtful or obscure. * * * But when taking the act as a whole, the effect of the language used is clear to the court, extraneous aid like this can not control the interpretation. * * * *Such aids are only admissible to solve doubt and not to create it.*" (citations omitted)

As pointed out above, in the case at bar there is absolutely no ambiguity whatsoever with regard to the meaning of the language used in Section 9. In the words of Mr. Justice Rutledge in *Oklahoma Press Publishing Co.* v. *Walling*, 327 U. S. 186, 201 (1946):

> "* * * this case presents an instance of 'the most explicit language' which leaves no room for questioning Congress' intent."

Accordingly, the reliance on legislative history by the majority in the Court below was improper.

It seems clear that in order to achieve a result which it thought Congress had intended, the court below—contrary to established mandates of this Court—not only relied on legislative history when the meaning of the statute was clear from its wording, but in effect "pulled itself up by its own bootstraps" by relying on legislative history to create a doubt in the first instance, and then proceeded to resolve this doubt against the meaning derived by Judges Cashin and Medina from the plain language used by Congress.

C. Effect on Commission's Functioning Under the Act

As in the case of legislative history, it has long been settled law in this Court that the fact that the effect of attributing to a statute the plain meaning of the words used would curtail or limit a federal agency in the exercise of its functions is not a sufficient excuse for amending the statute in the guise of construction. As stated by Mr. Justice Frankfurter in *Addison* v. *Holly Hill Fruit Products, Inc.*, 322 U. S. 607, 617 (1944):

> "Legislation introducing a new system is at best empirical, and not infrequently administration reveals gaps or inadequacies of one sort or another that may call for amendatory legislation. *But it is no warrant for extending a statute that experience may disclose that it should have been made more comprehensive. 'The natural meaning of words cannot be displaced by reference to difficulties in administration.'* Com. v. Grunseit (1943) 67 CLR (Austr) 58, 80."

In *Federal Trade Commission* v. *Ruberoid Co.*, 343 U. S. 470, 479 (1952), a case which presents a situation closely analogous to that in the case at bar, this Court denied the Federal Trade Commission the power to utilize the enforcement provisions of Section 5 of the Federal Trade Commission Act to enforce orders it had issued under the Clayton Act. In imposing this limitation on the exercise of the Commission's functions, Mr. Justice Clark stated:

> "Effective enforcement of the Clayton Act by the Commission may be handicapped by the present provisions, but that is a question of policy for Congress."

In support of their construction eliminating the word "such" from Section 9, the majority rely on the language of this Court in *United States* v. *American Trucking Ass'ns*, 310 U. S. 534 (1940) to the effect that even if the plain meaning of the wording of a statute is apparent, that meaning need not be applied if to do so would lead to "absurd", "futile" or "unreasonable" results. It is clear, however, that in the case at bar it is not Judge Cashin's construction, but rather, that of the majority in the Circuit Court which leads to the absurd and unreasonable results.

As pointed out above, the petitioner and his firm have absolutely no relationship with the athletic goods manufacturing industry other than their position as accountants for the Athletic Goods Manufacturing Association. As conceded by the Commission, and as was found by both the District Court and the Circuit Court, Ernst & Ernst is in no way under investigation or being proceeded against by the Commission. It is undisputed from the record that to enforce the subpoena in this case would result in the destruction of a valuable business built up by Ernst & Ernst and that the information obtained from Ernst & Ernst would be pure hearsay in the FTC-Spalding proceeding. Furthermore, the Commission can obtain—and, indeed, is now in the process of obtaining—the exact same information it seeks to obtain from Ernst & Ernst by going directly to the individual companies themselves. (See *F. T. C.* v. *Bowman*, F. Supp. , CCH Trade Reg. Rep., Par. 68,647 (N. D. Ill., decided February 15, 1957). In short, what the Commission seeks from its construction of the statute is the opportunity, without expense, to help itself to the information and records compiled by Ernst &

Ernst at great expense to that firm, in the face of undisputed allegations that to take this action would result in the destruction of a business which has proved to be of great value not only to Ernst & Ernst but to the government and the general public as well.

In the case of *Commissioner of Immigration* v. *Gottlieb*, 265 U. S. 310, 313 (1924), this Court upheld the action of the Commissioner of Immigration in excluding the respondents from this country as persons technically within the classes of aliens who are excluded from admission into the United States under Section 3 of the Immigration Act. While recognizing that this construction effected considerable hardship upon the respondents, the Court held that nonetheless the decision was compelled because of the plain meaning of the language used:

> "The case, as the evidence shows, is one of peculiar and distressing hardship and it is not unnatural that any appropriate canon of construction should be laid hold of to justify a conclusion favorable to the respondents. But if the plain words of the statute are against such a conclusion, leaving no room for construction, the courts have no choice but to follow it, without regard to the consequences."

In the case at bar, where under the circumstances outlined above substantial hardship to the petitioner would result from any construction other than that called for by the plain meaning of the words used, a strict adherence to the language used by Congress is *a fortiori* necessitated.

D. Administrative Usage

As in the case of legislative history, it is well settled that past practice by an administrative agency cannot be re-

ferred to except to resolve existing ambiguities in the language of a statute; where the language is clear, administrative usage is irrelevant. As stated by Mr. Justice Brown in *United States* v. *Tanner*, 147 U. S. 661, 663 (1893), where this Court denied the application of a United States Marshal for fees for serving warrants of commitment to a penitentiary, which fees were claimed under a federal statute allowing fees for travel to serve any "process, warrant, attachment or other writ":

> "If it were a question of doubt, the construction given to this clause prior to October, 1885, might be decisive; but, as it is clear to us that this construction was erroneous, we think it is not too late to overrule it. *United States* v. *Graham*, 110 U. S. 219; *Swift Co.* v. *United States*, 105 U. S. 691. *It is only in cases of doubt that the construction given to an act by the department charged with the duty of enforcing it becomes material.*"

Indeed, the majority in the Court below recognized this very principle by quoting the language of Mr. Justice Cardozo in *Norwegian Nitrogen Co.* v. *United States*, 288 U. S. 294, 315 (1933) to the effect that "administrative practice does not avail to overcome a statute so plain in its commands as to leave nothing for construction."

Since, as we have demonstrated, there can be absolutely no doubt as to the meaning of the plain words used in Section 9, the reliance by the majority on administrative usage was improper. Furthermore, it is well settled by prior decisions of this Court that an administrative body cannot by long usage create a power for itself which Congress has not seen fit to bestow upon it by statute. As stated in *Texas & Pacific Railway Company* v. *United States*, 289 U. S. 627, 640 (1933):

> "Where a statutory body has assumed a power plainly not granted, no amount of * * * interpretation is binding upon the courts."

In *Interstate Commerce Commission* v. *Cincinnati, New Orleans and Texas Pacific Railway Company*, 167 U. S. 479, 510 (1897), this Court rejected the claim of the Interstate Commerce Commission that it had the power to prescribe maximum and minimum rates, stating:

> "* * * it is urged that the commission has decided that it possesses this power and has acted upon such decision, and an appeal is made to the rule of contemporaneous construction. But it would be strange if an administrative body could by any mere process of construction create for itself a power which Congress had not given to it."

And in the recent case of *United States* v. *Morton Salt Co.*, 338 U. S. 632, 647 (1950), Mr. Justice Jackson, speaking with regard to the Federal Trade Commission, laid down the following dictum:

> "The fact that powers long have been unexercised well may call for close scrutiny as to whether they exist; but if granted, they are not lost by being allowed to lie dormant, *any more than nonexistent powers can be prescripted by an unchallenged exercise.*"

III. The Construction of Section 9 Adopted by the Court Below Is Unconstitutional

As pointed out above, neither petitioner nor Ernst & Ernst are a party to the FTC-Spalding proceeding; their role is entirely that of an innocent third-party witness. Furthermore, the record in this case contains undisputed

evidence on the part of petitioner that to compel production from Ernst & Ernst of information relating to the individual companies will cause the destruction of Ernst & Ernst's business of compiling Census Reports (26, 27, 41), a business with annual billings at present in excess of $100,000. Finally, as pointed out above, the Commission can obtain the exact same information it seeks to obtain without cost from Ernst & Ernst directly from the individual companies at far less expense to it than enforcement of the subpoena would entail for Ernst & Ernst.

Under these particular facts, we submit, the construction of Section 9 adopted by the majority in the Court below would render that section unconstitutional by permitting the Commission to deprive petitioner and Ernst & Ernst of their property without due process of law.

The Fifth Amendment to the United States Constitution provides, in part, that:

> "No person shall * * * be deprived of * * * property, without due process of law * * *."

There is little doubt but that a compilation of business information constitutes "property" within the meaning of this Amendment. *Board of Trade of the City of Chicago* v. *Christie Grain & Stock Co.*, 198 U. S. 236 (1905); *F. W. Dodge Co.* v. *Construction Information Co.*, 66 N. E. 204 (Mass. 1903); *California Intelligence Bureau* v. *Cunningham*, 188 P. 2d 303 (Cal. App. 1948).

And it is equally clear that a business is "property" under the Fifth Amendment. *Liggett Co.* v. *Baldbridge*, 278 U. S. 105, 111 (1928); *Truax* v. *Corrigan*, 257 U. S. 312 (1921); *Terrace* v. *Thompson*, 263 U. S. 197 (1923).

It is well settled by prior decisions of this Court that the validity of any statute under the due process clause depends on whether it is unreasonable, arbitrary or capricious and whether the means selected have a real and substantial relationship to the object sought to be obtained. As stated in *Nebbia* v. *New York*, 291 U. S. 502, 525 (1934):

> "* * * the guaranty of due process, as has often been held, demands * * * that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained."

See also *Railroad Retirement Board* v. *Alton Railroad Co.*, 295 U. S. 330 (1935); *Lapides* v. *Clark*, 176 F. 2d 619 (D. C. Cir.), *cert. denied*, 338 U. S. 860 (1949); *Speed* v. *Transamerica Corp.*, 99 F. Supp. 808 (D. Del. 1951).

We respectfully submit that under the facts of the case at bar the construction of Section 9 of the Federal Trade Commission Act adopted by the court below, allowing the Commission to destroy a valuable business by subpoenaing information from petitioners when it could obtain the exact same information by going to the individual companies involved, is so unreasonable, arbitrary and capricious as to deprive petitioners and Ernst & Ernst of their property without due process of law. The "object sought" by Section 9 is the obtaining of information; since that can be achieved by going to the companies themselves, to allow the Commission to compel the production of this information from Ernst & Ernst, an innocent third party, when to do so will destroy its business, has no "substantial relationship" to the object sought to be obtained, and is therefore unconstitutional.

IV. The Instant Case Presents a Substantial Question of Federal Law Which Has Not Been, and Should Be, Decided by This Court

It is not surprising that the principal question involved in this case has never before been presented to this, or any other, court; in all probability no Federal Trade Commission subpoena before has ever had such a devastating impact on its third-party recipient. It seems clear, however, that this question, involving the power of the Federal Trade Commission to subpoena documentary evidence from third parties not under investigation or being proceeded against by the Commission, presents an issue of major importance with respect to the administration of the Federal Trade Commission Act and the other federal statutes under which the Federal Trade Commission exercises responsibilities* and, therefore, is one which should be determined with finality by this Court.

The proceeding in which the subpoena here in question was issued was instituted by the Commission under the 1950 amendment to the antimerger provisions of Section 7 of the Clayton Act, a very recent addition to the federal antitrust laws. With the economy of this country expanding, and corporate mergers becoming more and more fre-

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* As listed in the brief of the Commission to the Circuit Court (p. 11), these statutes include the following: the Clayton Act (15 U. S. C. §12) as amended by the Robinson-Patman Act of 1936 and the Antimerger Act of 1950; the Webb-Pomerene Export Trade Act of 1918 (15 U. S. C. §61); the Wool Products Labeling Act of 1939 (15 U. S. C. §68); Public Law 15 relating to the regulation of the business of insurance (15 U. S. C. §1011); the Lanham Trademark Act of 1946 (15 U. S. C. §1051); the Fur Products Labeling Act of 1951 (15 U. S. C. §69); and the Flammable Fabrics Act of 1953 (15 U. S. C. §1191).

quent,* it can be expected that investigations and proceedings under this—and other—provisions of the antitrust laws will become more and more numerous.** In the course of these investigations and proceedings, it is only natural that the Commission—in its desire to find a ready-made collection of vital statistics for the particular industry involved—will, as in the case at bar, turn to trade associations, standard manuals of investment, and other private

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* A Report of the Senate Judiciary Committee, entitled "Corporate Mergers and Acquisitions", dated March 4, 1957, states:

> "The 1950 amendment was designed to strengthen the law concerning mergers and acquisitions. Paradoxically, the number of mergers and acquisitions has increased steadily each year since the amendment was enacted." Sen. Rep. No. 132, 85th Cong. 1st Sess. 4 (1957)

And in a recent lecture delivered before the Association of the Bar of the City of New York, the Assistant Attorney General in charge of the Antitrust Division stated that on the basis of reports in trade periodicals, financial newspapers and manuals of investment, since January, 1953 the staff of the Antitrust Division alone had reviewed a total of approximately 2,116 mergers and acquisitions. See Hansen, "Current Programs and Policies of the Antitrust Division," 2 Antitrust Bull. 163 (1956).

** The amendment to Section 7 of the Clayton Act under which the complaint against Spalding was issued was added to the antitrust laws on December 29, 1950. From that date through November 9, 1956 a total of twenty-five proceedings were instituted under this section: eight by the Department of Justice and seventeen by the Federal Trade Commission. All of the eight proceedings instituted by the Department of Justice were commenced in 1955 and 1956. The seventeen Federal Trade Commission proceedings were instituted in the following years:

1951 — 0
1952 — 1
1953 — 0
1954 — 2
1955 — 3
1956 — 11

See Bicks, "Conglomerates and Diversification under Section 7 of the Clayton Act", 2 Antitrust Bull. 175 (1956).

organizations which have as their principal business the collection and assembling of this type of information.*

Resistance to such subpoenas by these various organizations throughout the country can almost certainly be expected, with the result that a great deal of otherwise avoidable litigation will ensue, pending a final clarification by this Court of the question here involved. Since—as is evidenced by the division of opinion between the four judges who have participated in the case thus far—the question is an extremely close one, it can be expected that a conflict of decisions between various districts and circuits will arise. It seems safe to predict, therefore, that this question is one which eventually will have to be decided by this Court. We respectfully submit that the time to resolve this question is now, in order that this issue may be set to rest and much future fruitless litigation avoided.

In recent months, another problem of widespread importance with regard to the subpoena power of the Federal Trade Commission has been brought before the courts for the first time since the enactment of the Federal Trade Commission Act. This problem, involving the question whether the Federal Trade Commission has the power to issue subpoenas in proceedings brought solely to enforce the Clayton Act, has been the subject of recent decisions in the Courts of Appeal, for the Fourth and the Seventh Circuits as well as in the Second Circuit in the case at bar. A petition for certiorari from the decision of the Fourth Circuit (*Federal Trade Commission* v. *Menzies*, F. 2d

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* It is our understanding that in connection with proceedings presently outstanding under Section 7, the Commission has already made efforts to obtain material of this nature from various trade associations which have compiled information relating to the industry in question.

, CCH Trade Reg. Rep., Par. 68,648, decided March 7, 1957) is already pending before this Court, and it is our understanding that should the petition for rehearing in the decision of the Seventh Circuit (*Federal Trade Commission* v. *Reed*, F. 2d , CCH Trade Reg. Rep., Par. 68,676, decided April 11, 1957) be denied, an application for certiorari from that decision will also be made.

We respectfully submit that if this Court should see fit to grant certiorari to resolve the problem presented in these cases, it should *a fortiori* grant certiorari in the present case, which involves not only this question, but the additional, more compelling, problem of whether in the exercise of its responsibilities under all of the Acts it is called upon to enforce the Commission has the power to subpoena documentary evidence from partnerships or corporations which are neither under investigation nor being proceeded against by the Commission.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated: New York, N. Y., May 2, 1957.

Respectfully submitted,

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APPENDIX A

Statutes and Constitutional Provisions Involved

Constitution of the United States, Amendment V:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Federal Trade Commission Act, Section 9:

"That for the purposes of this Act the commission, or its duly authorized agent or agents, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documentary evidence of any corporation being investigated or proceeded against; and the commission shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation. Any member of the commission may sign subpoenas, and members and examiners of the commission may administer oaths and affirmations, examine witnesses, and receive evidence.

Such attendance of witnesses, and the production of such documentary evidence, may be required from

any place in the United States, at any designated place of hearing. And in case of disobedience to a subpoena the commission may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence.

Any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any corporation or other person, issue an order requiring such corporation or other person to appear before the commission, or to produce documentary evidence if so ordered, or to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof.

Upon the application of the Attorney General of the United States, at the request of the commission, the district courts of the United States shall have jurisdiction to issue writs of mandamus commanding any person or corporation to comply with the provisions of this Act or any order of the commission made in pursuance thereof.

The commission may order testimony to be taken by deposition in any proceeding or investigation pending under this Act at any stage of such proceeding or investigation. Such depositions may be taken before any person designated by the commission and having power to administer oaths. Such testimony shall be reduced to writing by the person taking the deposition, or under his direction, and shall then be subscribed by the deponent. Any person may be compelled to appear and depose and to produce documentary evidence in the same manner as witnesses

may be compelled to appear and testify and produce documentary evidence before the commission as hereinbefore provided.

Witnesses summoned before the commission shall be paid the same fees and mileage that are paid witnesses in the courts of the United States, and witnesses whose depositions are taken and the persons taking the same shall severally be entitled to the same fees as are paid for like services in the courts of the United States.

No person shall be excused from attending and testifying or from producing documentary evidence before the commission or in obedience to the subpoena of the commission on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to criminate him or subject him to a penalty or forfeiture. But no natural person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify, or produce evidence, documentary or otherwise, before the commission in obedience to a subpoena issued by it: *Provided,* That no natural person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying."

APPENDIX B

Opinions and Judgment Below

Opinion of the United States District Court for the Southern District of New York

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civil No. M-18-304

In the Matter of the Application to Enforce an Administrative Subpoena Duces Tecum of FEDERAL TRADE COMMISSION

Petitioner

—against—

W. W. TUTTLE, Resident Manager, Ernst & Ernst

Respondent.

MEMORANDUM OPINION

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Southern District of New York,
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Opinion of the District Court for the Southern District of New York

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CASHIN, JOHN M., *U.S.D.J.*

CASHIN, *D.J.*

This is an application by the Federal Trade Commission for an order directing the respondent, W. W. Tuttle, as Resident Manager of the accounting firm of Ernst & Ernst, to comply with the petitioner's subpoena duces tecum. Petitioner issued a subpoena duces tecum on the respondent whose accounting firm has been employed by the Athletic Goods Manufacturing Association, in a proceeding against A. G. Spalding & Bros., Inc. and Rawlings Co., charging a violation of Section 7 of the Clayton Act.

The subpoena duces tecum provided in part:

> "Such books, records and documents as will disclose all correspondence, telegrams, memoranda, statistics, work papers, bulletins, census and reports prepared, transmitted or received by Ernst and Ernst, its officers, agents, employees, boards, council, committee or member thereof for the past four years, in the possession or control of Ernst and Ernst and relate to census reports prepared for the Athletic Goods Manufacturing Association."

Opinion of the District Court for the Southern District of New York

In compliance with the subpoena, respondent produced certain industry census reports made available to the public, and also the individual reports submitted by Spalding and Rawlings, the companies against whom the petitioner was proceeding. Respondent refused to produce the reports submitted by any of the other participating companies, on the grounds that they were confidential communications, production would destroy their census reporting business, and the Commission was without power to subpoena them.

Section 9 of the Federal Trade Commission Act, (15 USCA Sec. 49), which gives the Commission the power to issue subpoenas, reads, in part, as follows:

> "9. For the purposes of this Act the Commissioner, or its duly authorized agent or agents, shall at all reasonable times have access to, for the purposes of examination, and the right to copy any documentary evidence of any corporation being investigated or proceeded against; and the commission shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation. Any member of the commission may sign subpoenas, and members and examiners of the commission may administer oaths and affirmations, examine witnesses, and receive evidence." (Underlining added)

Petitioner concedes that the information sought from respondent could be obtained directly from the companies whose reports are desired, but it is argued that it would be much more costly to so proceed. Respondent, on the other hand, has submitted substantial evidence that if it

produces the individual reports of the companies it will not receive them in the future and its business of compiling census reports will be destroyed.

It is the petitioner's position, however, that even if there is a serious risk of loss to the respondent's firm, the public interest in the production of this information far outbalances the injury to be expected, and enforcement is required. Fortunately, we do not feel that it is necessary for us to equate the public interest involved here (the cost of obtaining the reports from the individual manufacturers) as against the property rights of the respondent, for it is our opinion that the plain words of Section 9 of the Federal Trade Commission Act do not authorize the issuance of this subpoena.

The Statute gives the Commission " * * * the right to copy any documentary evidence of any corporation being investigated or proceeded against; and the commission shall have power to require by subpoena * * * the production of all such documentary evidence * * *."

Petitioner concedes that respondent is neither being investigated nor proceeded against. The subpoena is unauthorized and the application is denied. (See *Federal Trade Commission* v. *American Tobacco Co.*, 264 US 298; *Federal Trade Commission* v. *Baltimore Grain Co.*, 284 Fed. 886; affd. 267 US 586.)

Dated, New York, N. Y.
June 26th, 1956.

JOHN M. CASHIN
United States, District Judge

Opinion of the United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 232—October Term, 1956.

(Argued January 16, 1957 Decided April 2, 1957.)

Docket No. 24325

FEDERAL TRADE COMMISSION,

Petitioner-Appellant,

—against—

W. W. TUTTLE, Resident Manager, ERNST & ERNST,

Respondent-Appellee.

Before:

MEDINA and HINCKS, *Circuit Judges,* and
LEIBELL, *District Judge.*

Appeal from an order of the United States District Court, Southern District of New York (Cashin, *J.*) denying the application of the Federal Trade Commission for enforcement of an administrative subpoena *duces tecum,* issued pursuant to Section 9 of the Federal Trade Commission Act, directed to the respondent, W. W. Tuttle, a partner and resident manager of Ernst & Ernst, a firm of accountants and auditors. Reversed.

EARL W. KINTER, General Counsel, ROBERT B. DAWKINS, Assistant General Counsel, JOHN T. LOUGHLIN, Attorney, Washington, D. C. (Daniel M. Friedman, Attorney, Department of Justice, of Counsel), *for Appellant.*

DAVIS POLK WARDWELL SUNDERLAND & KIENDL, New York City (S. Hazard Gillespie, Jr., and Robert B. Fiske, Jr., of Counsel), *for Appellee.*

LEIBELL, *District Judge*:

The question to be decided on this appeal concerns the power of the Federal Trade Commission under Section 9 of the Federal Trade Commission Act, to subpoena documents and records of third parties "In the Matter of A. G. Spalding & Bros. Inc.," a corporation against which the Commission had filed a complaint, charging it with a violation of Section 7 of the Clayton Act (T. 15 U. S. C. §18).[1] The District Court denied an application by the Commission for an order enforcing a subpoena *duces tecum* to compel Ernst & Ernst, the accountants for the Athletic Goods Manufacturers Association, to produce records of members of the Association in the possession of the accountants, and their own records relating thereto.

On December 8, 1955, the Commission issued a complaint against A. G. Spalding & Bros. Inc. charging it with a

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[1] "No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."

violation of Section 7 of the Clayton Act in that the Spalding corporation, one of the four largest manufacturers and distributors of athletic goods in the United States, had acquired on or about December 6, 1955, all of the outstanding capital stock of the Rawlings Manufacturing Company, which was also one of the four largest in that field. The complaint further charged, in some detail, that by the acquisition of the Rawlings stock, Spalding had eliminated a large competitor, and that the acquisition of the stock would have the effect of substantially lessening competition or tending to create a monopoly in the manufacture and distribution of athletic goods.

In the course of the hearing, which an examiner of the Federal Trade Commission conducted in relation to the charges contained in the complaint, a subpoena *duces tecum* was served upon W. W. Tuttle of the accounting firm of Ernst & Ernst. The accounting firm, under an arrangement made with the Athletic Goods Manufacturers Association, prepared annually so-called "Census Reports" for the Association, based on information the accounting firm received from the Association's members in the form of statistical data and memoranda. Under its arrangement with the Association's members, Ernst & Ernst were to keep in strictest confidence the data thus received and the data was to be destroyed as soon as it had served the accountants' purpose in the preparation of the annual census report. The accountants had been preparing these reports for the Association since 1949. The reports set forth the sales in units and dollars of various categories and types of athletic equipment.

By a subpoena dated February 24, 1956, signed by the Federal Trade Commission Hearing Examiner and addressed to W. W. Tuttle, a partner and resident manager

of Ernst & Ernst, at Boston, Mr. Tuttle was required to appear and testify at a hearing before the Examiner to be held in the United States Courthouse in New York City on April 30, 1956, in the "Matter of A. G. Spalding & Bros. Inc."; and to bring with him the following books, papers and documents:

> "1. Such books, records and documents as will disclose all correspondence, telegrams, memoranda, statistics, work papers, bulletins, census and reports prepared, transmitted or received by Ernst and Ernst, its officers, agents, employees, boards, counsel, committee or member thereof for the past four years, in the possession or control of Ernst and Ernst and relate to census reports prepared for the Athletic Goods Manufacturing Association."

Ernst & Ernst only partially complied with the subpoena *duces tecum*. They produced the "census reports" and also, with the permission of the two corporations, so much of the data as the accounting firm had received from A. G. Spalding Bros. and Rawlings Manufacturing Company, for the years 1954 and 1955. Information as to individual companies for the years prior to 1954 had been destroyed before the institution of the Commission's proceedings against Spalding. But Ernst & Ernst did not produce any of the data and information they had received from the other individual companies who were members of the Association for the years 1954 and 1955, or their own records.

The Federal Trade Commission on May 17, 1956, filed a petition in the United States District Court, Southern District of New York, for an order compelling Mr. Tuttle, resident manager of Ernst & Ernst, to fully comply with the requirements of the subpoena *duces tecum*. The jurisdiction of the District Court to hear and consider the peti-

tion is derived from the third unnumbered paragraph of Section 9 of the Federal Trade Commission Act.[2]

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[2] Section 9 of the Federal Trade Commission Act provides (*T. 15 U. S. C. §49;* Chap. 311, §9, 38 Stat. 722):

"§49. DOCUMENTARY EVIDENCE; DEPOSITIONS; WITNESSES

For the purposes of sections 41–46 and 47–58 of this title the commission, or its duly authorized agent or agents, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documentary evidence of any corporation being investigated or proceeded against; and the commission shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation. Any member of the commission may sign subpoenas, and members and examiners of the commission may administer oaths and affirmations, examine witnesses and receive evidence.

Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing. And in case of disobedience to a subpoena the commission may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence.

Any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any corporation or other person, issue an order requiring such corporation or other person to appear before the commission, or to produce documentary evidence if so ordered, or to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof.

Upon the application of the Attorney General of the United States, at the request of the commission, the district courts of the United States shall have jurisdiction to issue writs of mandamus commanding any person or corporation to comply with the provisions of sections 41–46 and 47–58 of this title or any order of the commission made in pursuance thereof.

The commission may order testimony to be taken by deposition in any proceeding or investigation pending under sec-

Mr. Tuttle filed an answer to the petition and set up three special defenses:

(1) That under Section 9 of the Federal Trade Commission Act the petitioner, the Commission, does not have the power or authority to obtain by subpoena *duces tecum* documentary evidence of any corporation not being investigated or proceeded against, and that therefore the Commission cannot obtain by subpoena from Ernst & Ernst the reports of individual companies other than Spalding and Rawlings; and that the Court does not have the power to order the

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tions 41–46 and 47–58 of this title at any stage of such proceeding or investigation. Such depositions may be taken before any person designated by the commission and having power to administer oaths. Such testimony shall be reduced to writing by the person taking the deposition or under his direction, and shall then be subscribed by the deponent. Any person may be compelled to appear and depose and to produce documentary evidence in the same manner as witnesses may be compelled to appear and testify and produce documentary evidence before the commission as hereinbefore provided.

Witnesses summoned before the commission shall be paid the same fees and mileage that are paid witnesses in the courts of the United States, and witnesses whose depositions are taken and the persons taking the same shall severally be entitled to the same fees as are paid for like services in the courts in the United States.

No person shall be excused from attending and testifying or from producing documentary evidence before the commission or in obedience to the subpoena of the commission on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to criminate him or subject him to a penalty or forfeiture. But no natural person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify, or produce evidence, documentary or otherwise, before the commission in obedience to a subpoena issued by it: *Provided*, That no natural person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying. Sept. 26, 1914, c 311, §9, 38 Stat. 722."

Respondent Tuttle, or Ernst & Ernst, to produce the reports of those other companies.

(2) That Section 9 of the Federal Trade Commission Act if it grants the Commission that power of subpoena violates the Fifth Amendment of the United States Constitution, in that the Commission would be taking part of the business of Ernst & Ernst which it conducts as accountants for this Association and other similar groups, and would deprive Ernst & Ernst of a valuable business, without due process of law.

(3) That in view of the hardship it would impose on Ernst & Ernst if they are required to disclose this confidential information, which they assert is merely hearsay and not competent proof in the Spalding matter, enforcement of the subpoena would violate Section 6(c) of the Federal Administrative Procedure Act, as being unreasonable and oppressive and therefore not "in accordance with law."

The District Judge concluded "that the plain words of Section 9 of the Federal Trade Commission Act do not authorize the issuance of this subpoena." He held that the Commission's power of subpoena under Section 9 was limited to the production of any documentary evidence of any corporation being investigated or proceeded against; that the respondent (Mr. Tuttle as Resident Manager of Ernst & Ernst) is neither being investigated nor proceeded against (nor are the so-called other companies); and that "the subpoena is unauthorized and the application (of the Commission to enforce the subpoena) is denied."

The Commission on this appeal contends (1) that the District Court erred in its construction of the subpoena clause in Section 9 of the Federal Trade Commission Act; (2) and that although the Court did not reach other objec-

tions to the subpoena raised by respondent, they are without merit and the subpoena should be enforced.

The respondent-appellee in addition to the contentions asserted in the special defenses set forth in their answer, argue that the Commission has no authority to issue a subpoena *duces tecum* in a proceeding brought by it to enforce the Clayton Act.

Before taking up the main issue presented by this appeal, the construction of Section 9 of the Federal Trade Commission Act, the collateral issues will be considered.

Section 9 of the Federal Trade Commission Act is not unconstitutional if its provisions permit the service of the subpoena *duces tecum* in this case. The petitioner is seeking the production by the respondent of 150 reports which were furnished by members of the Athletic Goods Manufacturers Association to Ernst & Ernst to enable it to prepare the annual "census report" for the industry. The 150 reports are not "privileged" or confidential communications. The data sought is relevant to the issues that will arise under the allegations of the complaint which the Commission has filed against Spalding, as a reading of the complaint will show. The "reports" have a bearing on the competitive relationship of the members of the Association and will serve to establish the extent of the market control that may have resulted from Spalding's purchase of the Rawlings stock. For those reasons also the subpoena does not violate the Federal Administrative Procedure Act (§5c) in relation to subpoenas.[3] The subpoena is not unreasonable in its scope, nor in any way oppressive, and it is in accordance with law, if the Commis-

[3] T. 5 U. S. C. §1005; Chap. 324, 60 Stat. 237, June 11, 1946.

sion had the power under Section 9 of the Federal Trade Commission Act, to issue the subpoena.

The use of the subpoena would not be unconstitutional even if it indirectly had an adverse effect on a certain part of Ernst & Ernst's accounting business. The public interest to be served is superior. If the Association and similar groups wish to have the "census reports" prepared annually, accountants from convenient offices of Ernst & Ernst (they have 60 offices in the United States) could examine the necessary data at the offices of the Association's members. There appears to be no reasonable basis for respondent's contention that either the petitioner or the United States, of which it is an Agency, is taking respondent's property without due process of law.

Defendant's contention that the Federal Trade Commission does not have the power to issue subpoenas in a proceeding under the Clayton Act, overlooks the fact that both the Clayton Act and Federal Trade Commission Act were under consideration by the Congress at the same time;[4] that the Congressional debates show that investigations under the Clayton Act were to be conducted by the Commission;[5] that the Commission is mentioned in Sections 2, 7 and 11 of the Clayton Act; and that under Section 11 of the Clayton Act (§21 of T. 15 U. S. C.) the Federal Trade Commission is authorized to enforce compliance with Section 7 of the Clayton Act (§18 of T. 15 U. S. C.). Likewise the Commission was granted the power under Section 1 of the Robinson-Patman Act (§13 of T. 15 U. S. C.) to investi-

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[4] The Federal Trade Commission Act was enacted by the 63rd Congress (2nd Session) on September 26, 1914, and the Clayton Act was enacted October 15, 1914.

[5] 51 Cong. Rec. 12918; 14475; 13214; 14090; 14222; 16162; 16319; 16332.

gate and institute proceedings to enforce the provisions of the Robinson-Patman Act. The Supreme Court has held that the Commission possesses "broad power of investigation and subpoena" which it may use prior to the filing of a complaint for price discrimination, a violation of the Robinson-Patman Act. *Automatic Canteen Co.* v. *F. T. C.*, 346 U. S. 61, 79. The subpoena power necessary for that purpose is found in Section 9 of the Federal Trade Commission Act. The Robinson-Patman Act contained no subpoena powers.

An adequate subpoena power is essential to any investigation of offenses under the Clayton Act[6] and to the enforcement of Section 7 of that Act. The Congress evidently concluded that it was unnecessary to incorporate the full subpoena power in both Acts and was content to set it forth in Section 9 of the Federal Trade Commission Act.[7] The Congress followed a similar course in later

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[6] Chap. 323, 38 Stat. 730 (Oct. 15, 1914).
The Federal Trade Commission Act supplements the Clayton and Sherman Acts; and Section 5 of the Federal Trade Commission Act "minimally registers violations of the Clayton and Sherman Acts." *Times-Picayune Pub. Co.* v. *United States*, 345 U. S. 594, 609. The Federal Trade Commission has the power to suppress as unfair competition, practices of a combination that run counter to the public policy declared in the Sherman and Clayton Acts. *Fashion Guild* v. *Trade Comm'n*, 312 U. S. 457, 463 (footnote 4).

[7] See opinion of Thomsen, *C. J.* (Md.) in *Federal Trade Commission* v. *Menzies*, 145 F. Supp. 164, 168 in support of this power, and opinion of Judge Dimock (S. D. N. Y.) in *Federal Trade Commission* v. *Rubin*, 145 F. Supp. 171, *contra*, presently on appeal to this Court (Docket #24449).

On appeal to the Fourth Circuit Court of Appeals, that Court, in an opinion by Parker, *C. J.*, affirmed on March 7th Judge Thomsen's decision in the *Menzie's* case, and held that in a proceeding against three corporations, which were charged with the violation of Section 2(a) of the Clayton Act as amended by the Robinson-Patman Act, the Federal Trade Com-

anti-monopoly and unfair trade-practices Acts,[8] relating to certain specific industries or markets, and it did not in those Acts set forth the subpoena powers required for the investigations to be conducted by the Commission.

The main issue on this appeal is the scope of the subpoena power given the Federal Trade Commission in Section 9 of the Federal Trade Commission Act. The argument of respondent on that point is that the subpoena power is limited to documents and records of the corporation being investigated or proceeded against, which in this case would be the Spalding corporation and possibly the Rawlings corporation. Respondents stress the use of the word "such" in the first sentence of Section 9, which states:

> "Sec. 9. That for the purposes of this Act the commission, or its duly authorized agent or agents, shall at all reasonable times have access to, for the purpose of examination and the right to copy any documentary evidence of any corporation being investigated or proceeded against; and the commission shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such docu-

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mission could exercise its right to subpoena records under Section 9 of the Federal Trade Commission Act.

A recent (Feb. 15, 1957) opinion of Judge Hoffman (No. Dist. of Ill.) holds that the "subpoena power conferred upon the Commission is available to it in the discharge of its duties under this Clayton Act," citing *F. T. C.* v. *Reed Candy Co.*, another Northern District Illinois case, decided June 12, 1956.

[8] The Acts under which the Federal Trade Commission exercises responsibilities are listed in Section 1.2 entitled "Laws Administered" under Subpart A of Part 1 (setting forth general procedures and rules of practice of the Federal Trade Commission) 15 U. S. C. A. §1.2 of the 1956 Cumulative Annual Pocket Part for Title 15, §§41 to 80.

mentary evidence relating to any matter under investigation."

The word " 'such' is a rather slippery word" as Judge Dobie remarked in *United States* v. *Legg*, 157 F. 2d 990, 992. Some of its many meanings, depending upon its context, are discussed in 83 *C. J. S.* p. 771. As a rule it is used to refer to an antecedent. The respondent argues that its antecedent in the first sentence of Section 9 is "documentary evidence of any corporation being investigated or proceeded against." That contention might appear to be reasonable if we read only the language of the first sentence of Section 9 disregarding the other provisions of Section 9; the purpose and policy of the Federal Trade Commission Act; its legislative history; the Congressional intent; and the effect of respondent-appellee's construction of Section 9, if adopted, upon the Commission's functioning under the Act. "There is sufficient ambiguity here to permit consideration of relevant legislative history." *Mastro Plastics Corp.* v. *Labor Board*, 350 U. S. 270, 287. In that case the Court ruled on "a narrowly literal construction of the words" of Section 8(d) of the National Labor Relations Act, as the court observed in *Labor Board* v. *Lion Oil Co.*, 352 U. S. 282, 288.

The Federal Trade Commission Act was the work of the 63rd Congress, 2nd Session. In April 1914, a bill known as H. R. 15613 was introduced in the House of Representatives and was referred to its Committee on Interstate and Foreign Commerce. It was passed by the House on June 5, 1914. On June 13, 1914, the Senate Committee on Interstate Commerce, to which H. R. 15613 had been referred, reported as a substitute Senate Bill No. 4160 which had been reported favorably to the Senate on June 6th. The Senate and House bills went to conference and a conference bill emerged. The House conference report is No.

1142 and is dated September 4, 1914. The conference bill was passed by the Congress September 26, 1914, and as passed contained Section 9 in its present form.

H. R. 15613, in the Second paragraph of Section 10, provided:

> "For the purpose of prosecuting any investigation or proceeding authorized by this section the commission, or its duly authorized agent or agents, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documentary evidence of any corporation being investigated or proceeded against."

And in Section 16 provided:

> "Sec. 16. That for the purposes of this Act, and in aid of its powers of investigation herein granted, the commission shall have and exercise the same powers conferred upon the Interstate Commerce Commission in the Acts to regulate commerce to subpoena and compel the attendance and testimony of witnesses and the production of documentary evidence and to administer oaths."

Senate Bill 4160 provided, in the second paragraph of Section 3(g):

> "For the purpose of prosecuting any investigation or proceeding authorized by this section the commission, or its duly authorized agent or agents, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documents or writings of any corporation being investigated or proceeded against."

And in Section 8 provided:

> "Sec. 8. The commission shall have and exercise the powers possessed by the Interstate Commerce Commission to subpoena and compel the attendance and testimony of witnesses and the production of evidence, and to administer oaths."

From the above it appears that the second paragraph of Section 10 of H. R. 15613 and the second paragraph of Section 3(g) of Senate Bill 4160 are almost identical. The words "any documentary evidence" appear in the House Bill and the words "and documents or writings" in the Senate Bill.

The substance of Section 16 of the House Bill is the same as Section 8 of the Senate Bill.

When it came to drafting Section 9 of the conference bill (which became the Federal Trade Commission Act), the language of Section 10 of the House Bill was followed in the first half of the first sentence of Section 9 of the Act, and then recourse was had to the Interstate Commerce Commission Act, Section 12, for the second half of the first sentence of Section 9 of the Act. The conference committee decided to have the Federal Trade Commission Act contain its own subpoena powers, without reference to the Interstate Commerce Commission Act.

The last part of Section 12 of the Interstate Commerce Commission Act (T. 49 U. S. C. §12) states:

> "* * * the commission shall have power to require, by subpoena, the attendance and testimony of witnesses and the production of all books, papers, tariffs, contracts, agreements, and documents relating to any matter under investigation."

Compare this with the last part of the first sentence of Section 9 of the Federal Trade Commission Act which provides:

> "* * * the commission shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation."

What the draftsman did in incorporating the subpoena provisions of the Interstate Commerce Commission Act into the conference bill, which became the Federal Trade Commission Act, was to substitute the words "Such documentary evidence," for the words "Books, papers, tariffs, contracts, agreements, and documents" of the Interstate Commerce Commission Act. But by moving the subpoena provisions from its place in Section 16 of the House Bill (#15613) to a position in the conference bill where it would immediately follow Section 10 of the House bill, relating to the Commission's right of access to "any documentary evidence of any corporation being investigated or proceeded against," the draftsman introduced the word "such" which has given rise to the main issue on this appeal. The word "such" was placed in a position where it might be argued, as the respondents do here, that the word "such documentary evidence" in the second half of the first sentence of Section 9 of the Act were subject to the limitation that it must be the "documentary evidence of a corporation being investigated or proceeded against," mentioned in the first half of that sentence.

The draftsman of the conference bill that became the Federal Trade Commission Act took the first sentence of paragraph 2 of Section 12 of the Interstate Commerce Commission Act (without change) and made it the first sentence of the second paragraph of Section 9 of the Federal Trade

Commission Act, so that it reads: "Such attendance of witnesses, and the production of such documentary evidence may be required from any place in the United States at any designated place of hearing." In the Interstate Commerce Commission Act the words "such documentary evidence" refer to "all books, papers, tariffs, contracts, agreements, and documents." Section 12 of the Interstate Commerce Commission Act is also the source of other provisions of Section 9 of the Federal Trade Commission Act, including those relating to recourse to the District Court to enforce the Commission's subpoenas and the taking of testimony by deposition.

Respondent's narrow construction of the first sentence of the first paragraph of Section 9 is in direct conflict with the broad provisions of the fifth paragraph of that section, relating to the taking of testimony by deposition "in any proceeding or investigation pending under this Act." The word "such" is not used in relation to "documentary evidence" in any part of the fifth paragraph. That paragraph contains no limitation on the origin of the "documentary evidence"; and any person "may be compelled to appear and depose and to produce documentary evidence in the same manner as witnesses may be compelled to appear and testify and produce documentary evidence before the commission as hereinbefore provided." The compulsion would be supplied by an order of the District Court in the manner provided in the third paragraph of Section 9. If respondent's construction of the first sentence of Section 9 were correct, the result would be incongruous. A witness subpoenaed to produce documents at a hearing before an Examiner, could not be compelled to produce documents of persons other than the corporation under investigation; but if the testimony of the witness was being taken by deposition he could be compelled to produce the documents.

A provision appearing in the last paragraph of Section 9 of the Federal Trade Commission Act grants to natural persons testifying or producing documentary evidence under subpoena, immunity from prosecution or penalty or forfeiture "for or on account of any transaction, matter, or thing concerning which he may testify, or produce evidence, documentary or otherwise, before the commission in obedience to a subpoena issued by it: *Provided*, That no natural person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying."

A natural person does not have the protection of the Fifth Amendment of the Constitution in respect to books and papers of a corporation which are in his physical possession, even though they contain matters which might tend to incriminate him. [*Wilson* v. *United States*, 221 U. S. 361.] The inference is warranted that the "immunity" provision was made part of Section 9 of the Federal Trade Commission Act, in order that the Commission might compel the production of books and papers belonging to natural persons, or to partnerships being examined through a resident partner (Ernst & Ernst through Mr. Tuttle). That conclusion negatives the idea that the subpoena power of the Commission under Section 9 is limited to documents of a corporation under investigation or being proceeded against.

The limited construction of the word "such," contended for by the respondents, would also result in this anomalous situation—that oral testimony could be elicited by the Commission in examining a witness under subpoena, concerning transactions reported in the books and records of the individual or partnership, but the books and records themselves could not be subpoenaed.

If the power of the Commission to subpoena records is limited to records of corporations being investigated or

proceeded against, and if there is no right to subpoena records of individuals or partnerships under Section 9 of the Act, how could the Commission fulfill it duties under Section 5 of the Act, relating to "unfair methods of competition," which specifically includes violations by a "person, partnership or corporation"? (§45 of T. 15 U. S. C. A.) This is further evidence of the destructive effect which the construction the respondents herein place upon the word "such," in the first sentence of Section 9 of the Act, would have upon the proper functioning of the Commission.

Further, if the second half of the first sentence of Section 9 limits the subpoena power of the Commission to documents of the corporation under investigation, to which the Commission is given access and the right to make copies under the first half of the sentence, of what use is the grant of the power of subpoena? The Commission could get all the information it wanted from the corporation under the access and copying power. Respondent's construction of the language granting the subpoena power, would in effect render the subpoena power useless—an absurd result never contemplated by the Congress.

As the Supreme Court has repeated several times: "In expounding a statute we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law and to its object and policy." *United States* v. *Boisdore's Heirs,* 8 How. 113, 121, quoted in *Mastro Plastics Corp.* v. *Labor Board,* 350 U. S. 270, 285, and in *Labor Board* v. *Lion Oil Co.,* 352 U. S. 282. To the same effect, see *United States* v. *American Trucking Ass'ns,* 310 U. S. 534, 542 and 543.

Finally, the respondent's narrow construction of the words "such documentary evidence" as used in the first paragraph of Section 9 of the Act would impair the proper functioning of the Commission. The accounting firm, hav-

ing in its possession data supplied by third parties "relating to the matter under investigation" by the Commission, would be immune from subpoena for the production of the data, and the third parties themselves would likewise be immune. The Commission would be limited to the documentary evidence of the corporation being investigated, even though the investigation concerned the effect of the monopolistic acquisitions or unfair competitive practices of that corporation on others in the industry. Proof of the extent of the monopolistic trend of acquisitions by a corporation and their effect on the industry might well be found in the records of other corporations in the same industry. Without those records the Commission might fail to establish important allegations of its complaint.

It was clearly the purpose of the Congress that the Commission should have adequate subpoena power to perform it duties. In reporting *H. R. 15613* the House committee stated (House Report 533):

> "In order that the Commission may have ample power of subpoena and production of books and papers the language of section 16 of the bill has been expressly made broad enough to permit a full exercise of that power in connection with any kind of investigation which may be undertaken."

The report of the Senate Committee (Senate Report No. 597) on the House bill as redrafted by the Senate, stated:

> "* * * it is indispensable that it (the Commission) should have extensive power of inquiry, with the right to subpoena witnesses and to require the production of books and papers. The powers which, according to this bill are granted to the commission, are practically the same as those now granted to the Interstate

Commerce Commission or the Bureau of Corporations * * *"[9]

In a report on the Conference Bill (Report No. 1142) made to the House on September 14, 1914, it was stated that in the Conference Bill "the administrative process for conducting investigations, summoning witnesses and punishing violations is substantially as in the House bill," i.e., the same as the power possessed by the Interstate Commerce Commission.

A correct interpretation of the long first sentence of Section 9 of the Federal Trade Commission Act should recognize the fact that it grants two separate powers to the Commission, and that the language granting those distinct powers is separated by a semi-colon. The first grants the right of access to and the right to copy any documentary evidence of the corporation being investigated or proceeded against. The second grants a subpoena power for the production of documentary evidence relating to any matter under investigation.

In the second half of the first sentence of Section 9 the words "the production of all such documentary evidence relating to any matter under investigation" should be construed to mean "the production of all documentary evidence relating to any matter under investigation," thus eliminating the word "such." That will comply with the policy and purposes of the Act itself.

The policy of the Act must be considered, and its purposes, in construing the powers given the Commission to

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[9] The Act to establish the Department of Commerce and Labor (Ch. 552, 32 Stat. p. 827) enacted February 14, 1903, contained provisions for a Bureau of Corporations (§6); and that Bureau was given the same power to compel the attendance and testimony of witnesses and the production of documentary evidence as was conferred upon the Interstate Commerce Commission.

function under the Act. Even if the plain meaning of the wording of a statute is apparent, the Supreme Court will not apply that meaning if that would lead to "absurd or futile results." The Court "has looked beyond the words to the purpose of the Act." And frequently, when the plain meaning produces "merely an unreasonable result which is plainly at variance with the policy of the legislation as a whole" the Supreme Court "has followed that purpose, rather than the literal words." *United States* v. *American Trucking Ass'ns,* 310 U. S. 534, and cases cited on p. 543.

In the case of *Federal Trade Commission* v. *Fred J. Bowman, President, Wilson Athletic Goods Manufacturing Company,* decided by Judge Hoffman on February 15, 1957, the Federal Trade Commission had filed in the District Court, Northern District of Illinois, a petition for the enforcement of a subpoena *duces tecum* directing Wilson & Co. to produce certain records, in this same proceeding of *Federal Trade Commission* v. *A. G. Spalding & Bros. Inc.* In resisting the effort of the Federal Trade Commission to compel the production of the Wilson Company's records under subpoena in the "proceeding" against Spalding, the Wilson Company made the same contention advanced by the respondent in the case at bar, namely that the word "such" as used in the second half of the first sentence of Section 9 of the Federal Trade Commission Act, relates only to the records of a corporation being investigated or proceeded against. Judge Hoffman's opinion states:

> "It is unnecessary to decide whether the defendant's interpretation attaches more significance to the word 'such' than it can reasonably be made to bear. The argument fails upon another ground. Conceding that the Wilson company is not being 'proceeded against' within the meaning of the quoted portion of Section 9,

> the question remains whether the company is 'being investigated' as that term is used in the Act. Section 6 of the Federal Trade Commission Act, 38 Stat. 721, 15 U. S. C. §46 • • • "

Judge Hoffman held that the Wilson company could be termed a corporation "being investigated."

Without expressing any opinion on the applicability of Section 6 of the Federal Trade Commission Act (relating to investigations by the Commission) to the records of a corporation whose officer is to be examined as a witness in a "proceeding" against another corporation, we conclude that the *Bowman* case is not a precedent contra to the construction we have given to the first sentence of Section 9 of the Federal Trade Commission Act.

Section 6(f) of the Federal Trade Commission Act gives the Commission the power

> "(f) To make public from time to time such portions of the information obtained by it hereunder, except trade secrets and names of customers, as it shall deem expedient in the public interest; and to make annual and special reports to the Congress and to submit therewith recommendations for additional legislation; and to provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use."

The respondents contend that the information sought by the Commission under the subpoena in the case at bar would include the sales records of the individual companies and that those records may be properly classified as "trade secrets." Assuming, *arguendo,* that sales records of the individual companies are trade secrets under Section 6(f),

all that that section forbids is the *publication* of "trade secrets and names of customers," in public reports that the Commission may make "from time to time" which it "shall deem expedient in the public interest." That does not mean that "trade secrets and names of customers" may not be subpoenaed by the Commission in any proceeding or investigation under the Act. They may be subpoenaed in litigation in the Federal Courts, if the information is relevant and necessary to the presentation of a case. 4 *Moore*, Federal Practice, §26.22 p. 1087.

The Clayton Act and the Federal Trade Commission Act have been in effect since 1914. The Commission has consistently followed the subpoena practice that is here challenged. Only within the last two years has the legality of that practice been questioned. An "administrative practice does not avail to overcome a statute so plain in its commands as to leave nothing for construction"; but an "administrative practice, consistent and generally unchallenged, will not be overturned except for very cogent reasons if the scope of the command is indefinite and doubtful." (Judge Cardozo in *Norwegian Nitrogen Co.* v. *United States*, 288 U. S. 294, 315.) And "Courts are slow to disturb the settled administrative construction of a statute long and consistently adhered to" especially where "the declared will of the legislative body could not be carried out without the construction adopted." (Mr. Justice Stone in *Alaska Steamship Co.* v. *United States*, 290 U. S. 256, 262.)

For the reasons stated in this opinion, the order of the District Court is reversed and the mandate will direct that the District Court enter an order compelling the respondent to comply with the subpoena *duces tecum* at a time and place to be fixed by the Court.

MEDINA, *Circuit Judge* (dissenting):

Section 9 of the Federal Trade Commission Act, 38 Stat. 722, 15 U. S. C. Section 49, provides:

> That for the purposes of this Act the commission, or its duly authorized agent or agents, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documentary evidence of any corporation being investigated or proceeded against; and the commission shall have power to require by subpoena the attendance and testimony of witnesses and the production of all *such documentary evidence* relating to any matter under investigation. (Emphasis added.)

I think it clear beyond cavil, and my brothers seem to agree, that the phrase "such documentary evidence" is susceptible of no interpretation other than "documentary evidence of any corporation being investigated or proceeded against." Were the words capable of some other interpretation, it should not be adopted, for "the plain, obvious and rational meaning of a statute is always to be preferred to any curious, narrow, hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute and powerful intellect would discover." *Old Colony R. Co.* v. *Commissioner,* 284 U. S. 552, 560; *Lynch* v. *Alworth-Stephens Co.,* 267 U. S. 364, 370. See also *Crane* v. *Commissioner,* 331 U. S. 1, 6.

Nevertheless, my brothers have concluded that the word "such" crept into the statute inadvertently and that we have power to "eliminate" it in applying the statute. This they do, referring to the process as one of "construction." But the Supreme Court has indicated the proper bounds of "construction," declaring it permissible "To let general words draw nourishment from their purpose," but not "To

draw on some unexpressed spirit outside the bounds of the normal meaning of words." *Addison* v. *Holly Hill Co.*, 332 U. S. 607, 617. The Court condemned legislation in the guise of "construction," saying at p. 618:

> While the judicial function in construing legislation is not a mechanical process from which judgment is excluded, it is nevertheless very different from the legislative function. Construction is not legislation and must avoid "that retrospective expansion of meaning which properly deserves the stigma of judicial legislation." *Kirschbaum Co.* v. *Walling*, 316 U. S. 517, 522. To blur the distinctive functions of the legislative and judicial processes is not conducive to responsible legislation.

And the Court said in *Wisconsin R. R. Comm.* v. *C., B. & Q. R. R. Co.*, 257 U. S. 563, at pp. 588-9:

> Great stress is put on the legislative history • • •. Committee reports and explanatory statements of members in charge made in presenting a bill for passage have been held to be a legitimate aid to the interpretation of a statute where its language is doubtful or obscure. *Duplex Printing Press Co.* v. *Deering*, 254 U. S. 443, 475. But when taking the act as a whole, the effect of the language used is clear to the court, extraneous aid like this can not control the interpretation. *Pennsylvania R. R. Co.* v. *International Coal Mining Co.*, 230 U. S. 184, 198. *Caminetti* v. *United States*, 242 U. S. 470, 490. Such aids are only admissible to solve doubt and not create it.

As the Court said in *Oklahoma Press Pub. Co.* v. *Walling*, 327 U. S. 186, at p. 201, "This case presents an instance of 'the most explicit language' which leaves no room for questioning Congress' intent."

My brothers seek to justify departure from this rule by finding that limiting the powers of the Commission to those granted by the statute "would lead to absurd or futile results." With this conclusion I cannot agree.

First, it is said that it would be "absurd or futile" to provide that witnesses may be subpoenaed to produce only certain documents, whereas the provision of 15 U. S. C. Section 49, that "Any person may be compelled to appear and depose and to produce documentary evidence * * *," "contains no limitation on the origin of the 'documentary evidence.'" This "incongruity," it is said, provides sufficient excuse and authority for a court to grant to the Commission a power not contained in the statute defining its powers. But the premise is faulty. My brothers' construction fails to take into account the qualifying words immediately following that part of the statute quoted above. The entire sentence reads as follows: "Any person may be compelled to appear and depose and to produce documentary evidence *in the same manner as witnesses may be compelled to appear and testify and produce documentary evidence before the commission as hereinbefore provided.*" (Emphasis added.) Thus, there is no "incongruity," "absurdity" or "futility": the power to require production of documents in connection with depositions is precisely the same as the power to require production of documents by subpoena; it is unlimited only if the subpoena power is unlimited.

It is further said that it would be "absurd" for the Congress to authorize the Commission to subpoena only those documents to which it had access, for this "would in effect render the subpoena power useless." But my brothers' construction must fall before the same argument that engenders it, for if the point has merit would not then the access power be useless, and would this not be "an absurd

result never contemplated by the Congress"? The language of the statute and the legislative history make it clear, however, that the Congress considered the powers of access and of subpoena separate and distinct. For example, different penalties are provided for violations of these powers. 15 U. S. C. Section 50. I see no force in the argument that the subpoena power must be broader than the access power.

"Finally," my brothers assert, "the respondent's narrow construction of the words 'such documentary evidence' as used in the first paragraph of Section 9 of the Act would impair the proper functioning of the Commission." This conclusion stems, I think, from an erroneous reading of the Act as it stands. The Commission is undoubtedly empowered to subpoena documents of corporations "being investigated." My brothers give this term a narrow meaning; they consider that a corporation is "being investigated" only if the Commission is contemplating a proceeding against it. Yet Section 6(a) of the Federal Trade Commission Act, 38 Stat. 721, 15 U. S. C. Section 46, authorizes the Commission "to investigate from time to time the organization, business, conduct, practices, and management of any corporation engaged in commerce." Is not a corporation "being investigated" if it is the subject of a proper exercise of the Commission's powers under this section? It has been held that it is, *F. T. C.* v. *Bowman*, —— F. Supp. —— (N. D. Ill., decided February 15, 1957), and appellee agrees that this decision is correct. Nothing to the contrary may be found in *F. T. C.* v. *Hammond, Snyder & Co.*, 276 U. S. 586, affirming 284 Fed. 886, and *F. T. C.* v. *American Tobacco Co.*, 264 U. S. 298; those cases merely condemned "fishing expeditions into private papers on the possibility that they may disclose evidence of crime," 264 U. S. at 306, "when it [the Commission] has no reason to believe that any violation of law has been committed," 284 Fed. at 888. Thus, there is no need for a judicial redraft-

ing of the statute, since the Commission is given ample power to obtain the documents of corporations. And this power is available in the case at bar. To the extent the Commission finds it necessary to investigate other corporations in connection with its proceeding against Spalding, it is empowered to subpoena their papers relating to the matter under investigation. The subpoena need not be addressed to the corporation being investigated; any person, including natural persons and partnerships, may be compelled to produce "such documentary evidence." Although there is a requirement that the documents belong to a "corporation being investigated or proceeded against," there is none that they be in the possession of such a corporation. Hence I would reverse the decision below and direct the enforcement of the subpoena insofar as it relates to documentary evidence of the member corporations pertinent to the matter at hand.

My brothers seem to be convinced that the word "such" was accidentally inserted by the Conference Committee and was unwittingly adopted by both Houses and by the President. While such a series of mistakes is of course not beyond the realm of possibility, it is not the only reasonable explanation for the late introduction of the word. As my brothers point out, in the earlier versions of the Act the access power and the subpoena power were found in different sections in different parts of the Act. It is not unlikely that when the Conference Committee incorporated both powers into a single section they noticed for the first time that the power to subpoena documents was broader than the access power and, since there was no apparent reason why that should be so, they deliberately correlated the two.

Although I agree there do exist indications that the Congress omitted to grant a power it had intended to grant,

I am nevertheless unable to adopt the position taken by my brothers, for I do not understand that the intention of the legislators is law even though that intention has not found expression in legislation, or that the courts are free to grant to administrative agencies powers in excess of those specifically enacted by the Congress. "Legislation introducing a new system is at best empirical, and not infrequently administration reveals gaps or inadequacies of one sort or another that may call for amendatory legislation. But it is no warrant for extending a statute that experience may disclose that it should have been made more comprehensive." *Addison* v. *Holly Hill Co., supra,* at 617. Under our Constitution, that is the business of the Congress and the President, not of federal judges. See *Schwegman Bros.,* v. *Calvert Corp.,* 341 U. S. 384, 396-7 (concurring opinion):

> The Rules of the House and Senate, with the sanction of the Constitution, require three readings of an Act in each House before final enactment. That is intended, I take it, to make sure that each House knows what it is passing and passes what it wants, and that what is enacted was formally reduced to writing. It is the business of Congress to sum up its own debates in its legislation. Moreover, it is only the words of the bill that have presidential approval, where that approval is given. It is not to be supposed that, in signing a bill, the President endorses the whole Congressional Record. For us to undertake to reconstruct an enactment from legislative history is merely to involve the Court in political controversies which are quite proper in the enactment of a bill but should have no place in its interpretation.

Moreover, there are practical reasons why we should accept whenever possible the meaning which an enact-

> ment reveals on its face. Laws are intended for all of our people to live by; and the people go to law offices to learn what their rights under those laws are. * * * Aside from a few offices in the larger cities, the materials of legislative history are not available to the lawyer who can afford neither the cost of acquisition, the cost of housing, or the cost of repeatedly examining the whole legislative history. Moreover, if he could, he would not know any way of anticipating what would impress enough members of the Court to be controlling. To accept legislative debates to modify statutory provisions is to make the law inaccessible to a large part of the country.
>
> By and large, I think our function was well stated by Mr. Justice Holmes: "We do not inquire what the legislature meant; we ask only what the statute means." Holmes, Collected Legal Papers, 207.

My brothers find support in the statement of the Supreme Court that "administrative practice, consistent and generally unchallenged, will not be overturned except for very cogent reasons if the scope of the command is indefinite and doubtful." *Norweigian Nitrogen Co.* v. *United States*, 288 U. S. 294, 315. I fully subscribe to this principle, but it has no application here, for the words of the statute "construed" are neither "indefinite" nor "doubtful." More in point are the accompanying statement that "administrative practice does not avail to overcome a statute so plain in its commands as to leave nothing for construction," and the language of the Court in *United States* v. *Morton Salt Co.*, 338 U. S. 632 at p. 647:

> The fact that powers long have been unexercised may well call for close scrutiny as to whether they exist; but if granted, they are not lost by being allowed

to lie dormant, *any more than nonexistent powers can be prescripted by an unchallenged exercise.* (Emphasis added.)

Hence I dissent from the broad ruling by my brothers but would reverse and remand the case with directions to require appellant to comply with the subpoena *duces tecum* only to the extent of producing documentary evidence of the various corporations which I believe fall into the classification of "any corporation being investigated," as I have defined that phrase in what I have already written, and in accord with the ruling of Judge Hoffman in the *Bowman* case. This interpretation of Section 9 of the Federal Trade Commission Act, 15 U. S. C. Section 49, harmonizes the various clauses of the Section and accords to the words, "such documentary evidence," their natural and plain meaning in their context.

Judgment of the United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 2nd day of April, one thousand nine hundred and fifty-seven.

Present: HON. HAROLD R. MEDINA,
HON. CARROLL C. HINCKS,
Circuit Judges
HON. VINCENT L. LEIBELL,
District Judge

FEDERAL TRADE COMMISSION
Petitioner-Appellant

v.

W. W. TUTTLE, Resident Manager, Ernst & Ernst
Respondent-Appellee

Appeal from the United States District Court for the Southern District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is reversed and action remanded for further proceedings in accordance with the opinion of this Court.

A. DANIEL FUSARO
Clerk

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QUESTIONS PRESENTED

1. Whether the Federal Trade Commission's power to subpoena documentary evidence is limited to obtaining such evidence from corporations being investigated or proceeded against.

2. Whether requiring petitioner to comply with a Commission subpoena *duces tecum* would deprive him of property without due process of law.

STATUTES INVOLVED

Pertinent provisions of the Clayton Act, 38 Stat. 730, *et seq.* (15 U. S. C. 12, *et seq.*) and the Federal Trade Commission Act, 38 Stat. 717, *et seq.* (15 U. S. C. 41, *et seq.*) are set forth in the appendix, *infra*, pp. 13–16.

STATEMENT

On December 8, 1955 the Federal Trade Commission issued a complaint against A. G. Spalding Bros., Inc. ("Spalding"), charging that the latter's recent acquisition of all of the capital stock of Rawlings Manufacturing Company ("Rawlings") violated Section 7 of the Clayton Act, 15 U. S. C. 18 (Pet. 6b–7b). Spalding and Rawlings are two of the four largest manufacturers and distributors of athletic goods in the country (*id.* 7b).

During the course of the proceedings, the Commission issued a subpoena *duces tecum* to petitioner, a partner in the accounting firm of Ernst & Ernst. The subpoena directed petitioner to produce (1) certain "census reports" which Ernst & Ernst had prepared for the Athletic Goods Manufacturers Association, on the basis of underlying data which the individual

members of the Association had submitted to Ernst & Ernst, and (2) the underlying data themselves (*id.* 7b–8b). Petitioner produced the census reports and the underlying data for Spalding and Rawlings, but refused to produce the data received from the other members of the Association, primarily on the ground that they had been supplied "upon the condition that [they] be kept confidential and not disclosed," and that compelling disclosure would result in "destroying a business they [Ernst & Ernst] have built up over the years, taking or destroying property of theirs without due process of law and in violation of the Federal Constitution" (App. 10).[1]

The Commission then filed a proceeding in the district court to enforce the subpoena. That court denied enforcement on the ground that Section 9 of the Federal Trade Commission Act (15 U. S. C. 49) does not authorize the Commission to subpoena documentary material from persons not being investigated or proceeded against. The court held that since the Act gives the Commission only "the right to copy any documentary evidence of any corporation being investigated or proceeded against," and the "power to require by subpoena * * * the production of all *such* documentary evidence" (emphasis added), the Commission may subpoena documents only from corporations "being investigated [or] proceeded against"—a category which does not include petitioner (Pet. 4b).

The Court of Appeals for the Second Circuit, one judge dissenting, reversed. The court held (Pet. 24b)

[1] "App." refers to appellee's appendix in the court of appeals.

that Section 9 should be construed, as the Commission consistently has interpreted it, to empower the Commission to subpoena "all such documentary evidence relating to any matter under investigation"—a construction which will "comply with the policy and purposes of the Act itself." It rejected petitioner's "narrow construction" of Section 9, since that construction "would impair the proper functioning of the Commission" (Pet. 22b) by denying it the right to obtain from third persons documents which may be necessary to carry out its statutory duties (Pet. 23b). Such a result, the court stated (*ibid.*), would contravene the "purpose of the Congress," revealed in the legislative history (Pet. 16b–20b, 23b–24b), "that the Commission should have adequate subpoena power to perform its duties."

The court noted (Pet. 21b–22b) that reading the statute literally to limit the Commission's power to subpoena records to records of corporations being investigated or proceeded against would have a "destructive effect" upon the "proper functioning of the Commission." It pointed out that, although Section 5 of the Federal Trade Commission Act directs the Commission to prevent unfair and deceptive competitive practices by persons, partnerships and corporations, under a literal interpretation the Commission would be denied the right to subpoena the records of individuals or partnerships who were being investigated or proceeded against. The court also noted (Pet. 21b) that petitioner's construction would produce the "anomalous situation" that the Commission could compel oral testimony with respect to transactions

reported in individual and partnership books and records, but could not obtain the books and records themselves. Finally, the court rejected petitioner's contention that Section 9 would be unconstitutional if construed so that "it indirectly had an adverse effect on a certain part of Ernst & Ernst's accounting business," since "[t]he public interest to be served [by enforcement] is superior" (Pet. 13b).[2]

ARGUMENT

1. The court of appeals correctly held that the Commission may subpoena documentary evidence "relating to any matter under investigation" from persons who are not "corporation[s] being investigated or proceeded against." As the court pointed out, such a broad construction of the Commission's subpoena power is necessary for effective performance of the Commission's statutory duties; it is also strongly supported by the legislative history of the Federal Trade Commission Act and the Commission's consistent and long-standing administrative interpretation. Petitioner points to no public policy considerations which support its literal reading of the statute; on

[2] Circuit Judge Medina, dissenting (Pet. 28b–35b), was of the view that Section 9 limits the Commission to subpoenaing documents from corporations "being investigated or proceeded against." However, he would have remanded with directions to require petitioner to comply with the subpoena to the extent of producing documentary evidence of the various corporations which were "being investigated"—a category which, he suggested (Pet. 31b), was broad enough to cover a corporation which "is the subject of a proper exercise of the Commission's [investigatory] powers" under Section 6 (a) of the Act, whether or not the Commission "is contemplating a proceeding against it."

the contrary, he repeatedly urges (Pet. 11, 12, 14, 16, 18, 20, 21) that the "plain meaning" of the Act renders such considerations, as well as legislative history and administrative interpretation, completely irrelevant. But "however clear the words [of the statute] may appear on 'superficial examination,'" no "rule of law" forbids the use of every available "aid to construction," including legislative history. *United States* v. *American Trucking Ass'ns*, 310 U. S. 534, 543–544, 546–549.

A. In proceedings under the Clayton and the Federal Trade Commission Acts, the Commission necessarily relies to a large extent upon documentary evidence to show distribution, pricing and competitive practices and the like. Much of that evidence is in the hands of third persons. In the instant case, for example, the issue is whether the effect of Spalding's acquisition of Rawlings may be "substantially to lessen competition" or "tend to create a monopoly" in the sporting goods industry. As the court of appeals stated (Pet. 23b), this will require inquiry into "the effect of the monopolistic acquisition * * * on others in the industry," and proof of the "extent of the monopolistic trend of acquisitions * * * and their effect on the industry might well be found in the records of other corporations in the same industry. Without those records the Commission might fail to establish important allegations of its complaint." To deny the Commission the power to subpoena relevant documents in the hands of third parties would defeat "the purpose of the Congress that the Commission should have adequate subpoena power to perform its duties" (*ibid.*).

The court of appeals' construction of Section 9 is convincingly supported, as the opinion demonstrates (Pet. 16b–20b, 23b–24b), by the Act's legislative history. The original House and Senate bills defined the Trade Commission's subpoena power by reference to the subpoena power of the Interstate Commerce Commission, namely, "to subpoena and compel the attendance and testimony of witnesses and the production of [documentary] evidence." H. Rep. No. 1142, 63d Cong., 2d sess., pp. 13, 17.[3] The House Committee Report stated (H. Rep. No. 533, 63d Cong., 2d sess., p. 7):

> In order that the commission may have ample power of subpoena and production of books and papers the language of section 16 of the bill has been expressly made broad enough to permit a full exercise of that power in connection with any kind of investigation which may be undertaken.

Similarly, the report of the Senate Committee on the House bill, as redrafted by the Senate (S. Rep. No. 597, 63d Cong., 2d sess., p. 13), stated that the subpoena powers granted to the Commission were "practically the same as those now granted to the Interstate Commerce Commission," since "it is indispensable that it (the Commission) should have extensive powers of inquiry, with the right to subpoena witnesses and to require the production of books and papers."

[3] The Interstate Commerce Act, at that time, gave the Commission the "power to require, by subpoena, the attendance and testimony of witnesses and the production of all books [etc.] * * * relating to any matter under investigation" 26 Stat. 743; see 49 U. S. C. 12 (1).

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The Conference Committee substituted the present language in Section 9 (which contains the "such" clause) for that in the original bills in order to set forth specifically in the governing statute the subpoena power of the new commission, rather than to incorporate such power by reference to another statute. See Statement of House Manager Covington, 51 Cong. Rec. 14926. The Conference report shows that the change in language was not intended to narrow the scope of the Commission's power. The report stated (H. Rep. No. 1142, 63d Cong., 2d sess., p. 18) that "the administrative process for conducting investigations, summoning witnesses, and punishing violations is substantially as in the House bill," *i. e.*, the same as that conferred upon the Interstate Commerce Commission.

As the court of appeals pointed out (Pet. 27b), the Commission, since its creation in 1914, has "consistently followed the subpoena practice that is here challenged." An "administrative practice, consistent and generally unchallenged," will not be disturbed if the statutory command is "indefinite and doubtful" (*Norwegian Nitrogen Co.* v. *United States,* 288 U. S. 294, 315), particularly where, as here, the practice is necessary to carry out "the declared will of the legislative body" (*Alaska Steamship Co.* v. *United States,* 290 U. S. 256, 262).

B. Petitioner's literal construction of the Act must be rejected because it would produce "unreasonable"

results which are "plainly at variance with the policy of the legislation [considered] as a whole." *United States* v. *American Trucking Ass'ns,* 310 U. S. 534, 543–544. As we have shown, Congress intended to give the Commission adequate subpoena power, and such power would not be adequate if limited to obtaining documentary evidence from corporations being investigated or proceeded against.

A literal construction would lead to other unreasonable results. Thus, although Section 5 of the Federal Trade Commission Act directs the Commission to prevent unfair and deceptive competitive practices by "persons, partnerships, or corporations," Section 9, read literally, would deny the Commission the right to subpoena documents from those in the first two categories, whether or not they were the subject of Commission proceedings.[4]

Petitioner, seeking to avoid the anomalous results which a literal construction produces, states (Pet. 15) that "documentary evidence may be subpoenaed from partnerships and individuals as well as from corporations" so long as they are being investigated or proceeded against. But petitioner does not explain why the statute should be read literally only with re-

[4] Such a reading would be out of harmony with the immunity provision appearing at the close of Section 9, for that provision (*infra*, pp. 15–16) apparently contemplates that a natural person may be compelled to produce documentary evidence, a valid claim of privilege notwithstanding.

spect to the word "such," but otherwise read broadly so as to accomplish its purposes.

Since the "such" clause in Section 9 deals only with the Commission's power to subpoena documentary evidence, and not its power to compel testimony, a literal reading would lead to the further "anomalous situation" (Pet. 21b) that the Commission could compel oral testimony as to transactions recorded in the books of a partnership or an individual, but could not require production of the "best evidence" of such transactions—the underlying books themselves.

The "rational content" of the statute, rather than mere literalism, should control. *United States* v. *Witkovich,* No. 295, this Term, decided April 29, 1957. We submit that the court of appeals correctly construed Section 9 as empowering the Commission to subpoena all documentary evidence "relating to any matter under investigation," including material in the hands of third persons who are not corporations being investigated or proceeded against. As we have shown, that construction is a reasonable one which effectuates the Congressional purpose that "the Commission should have adequate subpoena power to perform its duties."

2. Petitioner further contends (Pet. 22–24) that the construction of Section 9 adopted by the court of appeals would render the statute unconstitutional, because it would result in depriving petitioner and Ernst & Ernst of their property without due process of law.

It argues (Pet. 23) that compelling Ernst & Ernst to disclose the information submitted to it in confidence by the individual members of the trade association "will cause the destruction of Ernst & Ernst's business of compiling Census Reports" (with annual billings of $100,000), and that (if the Government's construction of Section 9 is correct) the Commission could obtain the same information directly from the companies themselves.

As the court of appeals correctly held (Pet. 13b), however, the fact that enforcement of the subpoena "indirectly had an adverse effect on a certain part of Ernst & Ernst's accounting business" would not render the statute authorizing such enforcement unconstitutional. For "[t]he public interest to be served is superior" (*ibid.*). Here, it is in the public interest that the Commission promptly obtain the relevant collected data and that it avoid the long delay and additional expense which would result if it were required to proceed by individual subpoenas addressed to the seventy-odd companies involved. As this Court has said, "where the public interest is involved," that interest takes precedence over "the property interest of the individual, to the extent even of its destruction." *Miller* v. *Schoene,* 276 U. S. 272, 279–280; cf. *Hadacheck* v. *Los Angeles,* 239 U. S. 394, 410; *Nebbia* v. *New York,* 291 U. S. 502, 525.[8]

[8] We note that any possible injury to the companies which otherwise might be caused by disclosure of the data has been minimized by the Commission's undertaking to keep the data confidential (App. 19–20).

CONCLUSION

The decision of the court of appeals is correct, there is no conflict of decisions, and no other reason appears for the grant of review. Accordingly, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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MAY, 1957.

APPENDIX

Section 7 of the Clayton Act, 38 Stat. 731, as amended, 64 Stat. 1125 (15 U. S. C.) 18), provides as follows:

> No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.
>
> No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of one or more corporations engaged in commerce, where in any line of commerce in any section of the country, the effect of such acquisition, of such stocks or assets, or of the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition, or to tend to create a monopoly.

* * * * *

Section 5 of the Federal Trade Commission Act, 38 Stat. 719, as amended, 66 Stat. 632 (15 U. S. C. 45), provides as follows:

> SEC. 5 (a) (1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.

* * * * *

(6) The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

* * * * *

Section 9 of the Federal Trade Commission Act, 38 Stat. 722 (15 U. S. C. 49), provides as follows:

For the purposes of this Act the commission, or its duly authorized agent or agents, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documentary evidence of any corporation being investigated or proceeded against; and the commission shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation. Any member of the commission may sign subpoenas, and members and examiners of the commission may administer oaths and affirmations, examine witnesses, and receive evidence.

Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing. And in case of disobedience to a subpoena the commission may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence.

Any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any corporation or other person, issue an order requiring such corporation or other person to appear before the commission, or to produce documentary evidence if so ordered, or to give evi-

dence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof.

Upon the application of the Attorney General of the United States, at the request of the commission, the district courts of the United States shall have jurisdiction to issue writs of mandamus commanding any person or corporation to comply with the provisions of this Act or any order of the commission made in pursuance thereof.

The commission may order testimony to be taken by deposition in any proceeding or investigation pending under this Act at any stage of such proceeding or investigation. Such depositions may be taken before any person designated by the commission and having power to administer oaths. Such testimony shall be reduced to writing by the person taking the deposition, or under his direction, and shall then be subscribed by the deponent. Any person may be compelled to appear and depose and to produce documentary evidence in the same manner as witnesses may be compelled to appear and testify and produce documentary evidence before the commission as hereinbefore provided.

Witnesses summoned before the commission shall be paid the same fees and mileage that are paid witnesses in the courts of the United States, and witnesses whose depositions are taken and the persons taking the same shall severally be entitled to the same fees as are paid for like services in the courts of the United States.

No person shall be excused from attending and testifying or from producing documentary evidence before the commission or in obedience to the subpoena of the commission on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of

him may tend to criminate him or subject him to a penalty or forfeiture. But no natural person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify, or produce evidence, documentary or otherwise, before the commission in obedience to a subpoena issued by it: *Provided,* That no natural person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying.

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